No. 47932-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Richard Barnes,

Appellant.

Skamania County Superior Court Cause No. 15-1-00001-1

The Honorable Judge Brian Altman

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. While Richard Barnes was handcuffed and being loaded backwards into a police vehicle, his foot contacted one of the arresting officers.

Skamania County Sheriff's deputies Summer Scheyer and Jeremy Schultz arrested Richard Barnes on the night of New Year's Eve, 2014, after an anonymous party reported a domestic disturbance. RP (8/10/15) 20-24, 54. After speaking to Dana Brand, the woman with whom Mr. Barnes lived, the deputies went to Mr. Barnes's residence. RP (8/10/15) 20-21.

Mr. Barnes had been drinking and appeared intoxicated. RP (8/10/15) 24, 34-35, 47-48. He refused to answer the officers' questions. RP (8/10/15) 22, 49-50. The deputies grabbed Mr. Barnes, cuffed his hands behind his back, and took him to a patrol vehicle. RP (8/10/15) 23-25, 53.

The police car was a Chevy Tahoe, which "sits a little higher than the normal patrol cars." RP (8/10/15) 26-27. The deputies began pushing Mr. Barnes back-first into the rear seat. RP (8/10/15) 26-27. Schultz pushed Mr. Barnes's body onto the seat, and then tried to push his legs into the Tahoe so that the deputies could close the door. RP (8/10/15) 37.

Mr. Barnes began moving his legs in what Scheyer described as "a push kick." RP (8/10/15) 26. As Mr. Barnes "kept pushing and kicking," his foot made contact with Schultz's face a number of times. RP (8/10/15) 26-27, 37-38. Schultz told Mr. Barnes to stop kicking, stating that he would "be tased" if he did not. RP (8/10/15) 43. After that, Mr. Barnes complied,[1] and the deputies loaded him into the Tahoe. RP (8/10/15) 28, 38, 43.

Schultz then drove Mr. Barnes to jail. RP (8/10/15) 39. After Mr. Barnes was booked, Scheyer photographed a small reddish mark on Schultz's face. RP (8/10/15) 28; Ex. 1.

2. The state dropped the charge alleging domestic violence against Brand, and proceeded to trial only on an assault charge against Deputy Schultz.

The state charged Mr. Barnes by amended information with third degree assault for assaulting an officer. CP 36-37. The original Information had also included a fourth degree assault charge, based on Mr. Barnes's alleged conduct during the domestic disturbance. *See* RP (8/10/15) 4-5. On the day of trial, however, the prosecutor said that the state could not find Brand and filed the Amended Information omitting the fourth degree assault charge. RP (8/10/15) 4-5.

[1] According to Scheyer, Mr. Barnes kicked at the taser before he "settled down" enough for the deputies to get him in the Tahoe and shut the door. RP (8/10/15) 28. Schultz's

Mr. Barnes moved *in limine* to exclude any statements attributed to Brand. CP 9; RP (7/30/15) 4-5. The court granted the motion in part, expressly cautioning the state "to be careful about the reason for the officer having contact with Mr. Barnes" if Brand did not testify. RP (7/30/15) 8.

3. Jurors repeatedly heard that the deputies had probable cause to arrest Mr. Barnes on domestic violence assault charges.

The trial centered on whether Mr. Barnes had acted with the requisite intent when his foot contacted Shultz. *See* RP (8/10/15) 81, 86. Mr. Barnes testified that he kicked only in an attempt to get further inside the Tahoe because the deputies were trying to close the door on his legs. RP (8/10/15) 51-53.

Both deputies repeatedly testified that they had arrested Mr. Barnes for a domestic violence charge based on Brand's statements. RP (8/10/15) 20, 23, 33, 41. Both Scheyer and Schultz testified that they contacted Mr. Barnes regarding a "domestic dispute" after Scheyer spoke with Brand. RP (8/10/15) 20, 33. Scheyer went on to inform the jury that the deputies arrested Mr. Barnes "for domestic violence charges." RP (8/10/15) 23. On further inquiry by the prosecutor, Scheyer specified that she placed Mr.

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recollection of the incident did not include Mr. Barnes kicking at the taser. RP (8/10/15) 43.

Barnes under arrest for "Assault Four Domestic Violence." RP (8/10/15) 23.

The prosecutor asked why Scheyer had "come to the conclusion then that there was probable cause for arrest." RP (8/10/15) 23. Scheyer responded that she determined she had probable cause to arrest Mr. Barnes on domestic violence charges based on "[t]he statements given to [her] by Mrs. Brand." RP (8/10/15) 23. Schultz confirmed that Scheyer had "advised [him] there was probable cause for [Mr. Barnes's] arrest." RP (8/10/15) 41.

In closing, the prosecutor reiterated that the deputies had probable cause to arrest Mr. Barnes on domestic violence charges in closing. RP (8/11/15) 77. Specifically, the prosecutor began his closing by reminding jurors that the deputies responded to "a domestic dispute" and had "probable cause to arrest" Mr. Barnes based on Brand's statements to Scheyer.[2] RP (8/11/15) 77. In rebuttal, the prosecutor again referred to the "a domestic dispute" and the deputies' "probable cause for arrest." RP (8/11/15) 91. Defense counsel did not object to the references to probable cause and domestic violence. RP (8/10/15) 20-46; RP (8/11/15) 77, 91.

[2] During this portion of his argument, the prosecutor misrepresented Brand as "the reporting party." RP (8/11/15) 77. As noted, Scheyer actually testified that an anonymous caller reported the alleged domestic disturbance. RP (8/10/15) 20.

4. Scheyer referred to Mr. Barnes's conduct as an "assault," and the jury repeatedly heard that Mr. Barnes refused to answer the officers' questions.

In her testimony, Scheyer described Mr. Barnes's conduct towards Schultz as "the assault." RP (8/10/15) 26. The prosecutor immediately repeated this testimony, asking what Scheyer observed "when the assault occurred." RP (8/10/15) 26. Mr. Barnes's attorney did not object. RP (8/10/15) 26.

Scheyer testified over Mr. Barnes's objection[3] that he was "non-compliant" when the deputies initially contacted him. RP (8/10/15) 22. The prosecutor later asked Deputy Schultz whether Mr. Barnes responded to questions. RP (8/10/15) 34. Schultz answered that Mr. Barnes's "responses were somewhat vague and he was not very forthcoming with any information and not wanting to respond to our questions." RP (8/10/15) 34.

Later, on cross-examination of Mr. Barnes, the prosecutor asked specifically about his refusal to speak with the deputies. RP (8/10/15) 54. The prosecutor also discussed Mr. Barnes's unwillingness to answer the officers' questions in closing. RP (8/11/15) 91.

[3] Defense counsel unsuccessfully objected on the ground that the testimony was "conclusive." RP (8/10/15) 22.

5. The prosecutor repeatedly used the phrase "I think" and made other statements of opinion or belief in closing argument

In closing, the prosecutor repeatedly made statements using the phrases "I think" or "I believe." RP (8/11/15) 79-81, 92. First, after describing Mr. Barnes's actions during the arrest, the prosecutor said "*I think* they show the intent, ladies and gentlemen." RP (8/11/15) 80 (emphasis added). Second, referring to Scheyer's allegation that Mr. Barnes kicked at the taser, the prosecutor similarly stated, "*I think* it goes to show his demeanor and his intent when he struck" Schultz. RP (8/11/15) 80 (emphasis added). Third, in discussing the definition of assault, the prosecutor argued "*I don't think* you have to be unduly sensitive to find it offensive to be kicked in the face five times while doing your job." RP (8/11/15) 81 (emphasis added). Fourth, immediately before deliberations, the prosecutor made a similar remark regarding the burden of proof:

> *I believe* if you look at all the facts, you'll find that you can develop an abiding belief in the charge. *I think* you can find beyond a reasonable doubt there was an assault of a law enforcement officer carrying out his duty.

RP (8/11/15) 92 (emphasis added).

Defense counsel did not object to any portion of the prosecutor's argument. RP (8/11/15) 77-83, 89-92.

6. The court ordered Mr. Barnes to pay $1,800 in legal financial obligations, including $500 to the "Skamania County Sheriff's Investigative Fund."

The jury returned a guilty verdict. CP 54; RP (8/11/15) 95-96. The court ordered Mr. Barnes to pay $1,800 in legal financial obligations (LFOs). CP 58-65; RP (8/13/15) 5-6.

The LFOs included $500 for the "Skamania County Sheriff's Investigative Fund." CP 61. The only statutory basis identified for this obligation is a finding that the "Skamania County Sheriff's Office costs for its emergency response are reasonable." CP 57. The finding cites RCW 38.52.430. CP 57.

This timely appeal follows. CP 66.

ARGUMENT

I. MR. BARNES'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

Defense counsel unreasonably failed to seek the exclusion of unfairly prejudicial evidence that the officers had probable cause to arrest Mr. Barnes for a domestic violence assault. The error seriously undermined Mr. Barnes's defense.

A. Defense counsel provides ineffective assistance when his/her conduct is unreasonable and prejudices the client.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5 (a). Appellate courts review claims of ineffective assistance of counsel *de novo*. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

To obtain relief on an ineffective assistance claim, an accused person must show "that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at 109.

Although courts apply "a strong presumption that defense counsel's conduct is not deficient," a defendant rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Counsel's cumulative effect can deprive a client of a fair trial even when a single error does not. *See, e.g.*, *In re Restraint of Brett*, 142 Wn.2d 868, 882-83, 16 P.3d 601 (2001). That is, "[s]eparate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance." *Sanders v. Ryder*, 342 F.3d 991, 1000-01 (9th Cir. 2003).

Defense counsel's failure to object to evidence of uncharged misconduct can constitute deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (Hendrickson I). Counsel may also render ineffective assistance by failing to move *in limine* to exclude evidence of uncharged prior bad acts. *See State v. West*, 139 Wn.2d 37, 40, 983 P.2d 617 (1999).

To be entitled to relief on these grounds, an appellant must show that (1) defense counsel's failure to object fell below prevailing professional norms, (2) the trial court would likely have sustained a timely objection, and (3) the defendant had a reasonable probability of obtaining a more favorable trial result absent the challenged evidence. *In re Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

B. Defense counsel unreasonably failed to seek exclusion of irrelevant, uncharged, unfairly prejudicial allegations of domestic violence.

The allegation that Mr. Barnes had committed a domestic violence assault against Brand had no bearing on whether he committed the charged assault against Schultz. Admission of the domestic violence allegation posed a serious and obvious risk of unfair prejudice, not only due to widespread condemnation of such conduct in our society, but also because the jury could improperly use it as propensity evidence. No

reasonable tactical consideration can explain defense counsel's failure to seek the exclusion of the uncharged domestic violence allegation against Mr. Barnes.

Courts must use special care before admitting domestic violence allegations in a trial on other charges:

> Much like in cases involving sexual crimes, courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high.

State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). Because of this "heightened prejudicial effect," the *Gunderson* court "confine[d] the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value." *Id.* at 925.

Mr. Barnes's attorney knew about the allegation well before trial. *See, e.g.*, RP (7/2/15) 5-8. Defense counsel believed that Brand might not testify and that the state would have to drop the domestic violence assault charge. RP (7/30/15) 4-8. Given the state's obligation to articulate some "overriding probative value" favoring admission of such evidence, no conceivable tactical consideration explains defense counsel's failure to move *in limine* to exclude reference to domestic violence. *Gunderson*, 181 Wn.2d at 925.

Nor does any legitimate tactical consideration justify counsel's failure to object to the testimony once offered. The state's witnesses repeatedly discussed the domestic violence allegation. RP (8/10/15) 20-23, 33. Scheyer went so far as to inform the jury that she placed Mr. Barnes under arrest for "Assault Four Domestic Violence." RP (8/10/15) 23. Both deputies testified that they had probable cause to arrest Mr. Barnes on this charge, communicating to the jury that they considered the allegation credible. RP (8/10/15) 23, 41.

A motion *in limine* would have kept the jury from hearing the phrase "domestic violence." Furthermore, a timely objection could not have emphasized the evidence—instead, an objection would have prevented the state from repeating the phrase "domestic violence" in front of the jury.

No conceivable tactical consideration explains defense counsel's failure to seek the exclusion of the domestic violence allegation by a motion *in limine* or timely objection. The conduct of Mr. Barnes's attorney fell below an objective standard of reasonableness. *Hendrickson* I, 129 Wn.2d at 78-79; *West*, 139 Wn.2d at 40; *Reichenbach*, 153 Wn.2d at 130.

C. Defense counsel's unreasonable failure to seek exclusion of the domestic violence allegations prejudiced Mr. Barnes.

The court would likely have granted a pretrial motion to exclude any reference to domestic violence. The court would also likely have sustained a timely objection to the testimony concerning the allegations. Had the jury not heard about the domestic violence allegation, there is a reasonable probability that Mr. Barnes would have obtained a more favorable result.

1. The court would likely have excluded references to domestic violence had defense counsel asked it to do so.

Why the deputies were arresting Mr. Barnes, or whether they had probable cause to do so, had no bearing on whether he committed third degree assault against Schultz. *State v. Mierz*, 127 Wn.2d 460, 479, 901 P.2d 286 (1995) (holding that law enforcement officers are "performing their official duties" for purposes of the assault statute "even if making an illegal arrest").

The domestic violence allegation had no tendency to make more or less probable any matter at issue in the case. ER 401 and 402 thus rendered the testimony inadmissible.

Even if the evidence had been relevant, the trial court would have sustained a timely objection under ER 403 because its potential for unfair prejudice substantially outweighed whatever minimal probative value it

may have had. *See State v. Saltarelli*, 98 Wn. 2d 358, 362, 655 P.2d 697 (1982); *see also Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) ("[E]vidence may be unfairly prejudicial under rule 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or 'triggers other mainsprings of human action'") (quoting 1 J. WEINSTEIN & M. BERGER, EVIDENCE § 403[03], at 403–36 (1985)).

As discussed, domestic violence evidence poses a particularly high risk of unfair prejudice for purposes of ER 403. *Gunderson*, 181 Wn.2d at 925. Furthermore, the evidence should have been excluded under ER 404(b), which prohibits the introduction of allegations of prior misconduct. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

The alleged assault against Brand tended to make Mr. Barnes appear contemptible to the jury. Furthermore, because the evidence was admitted without limitation, the jury could have improperly used it as propensity evidence. *See State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). That is, jurors likely made the understandable but legally impermissible inference that, if the Mr. Barnes just assaulted Brand, he probably assaulted Schultz, too. *See Saltarelli*, 98 Wn.2d at 363; *State v. Fuller*, 169 Wn. App. 797, 830-31, 282 P.3d 126 (2012); *State v. Ramirez*,

46 Wn. App. 223, 227, 730 P.2d 98 (1986); *See also United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985).

The domestic violence allegation was irrelevant to the charged offense, and the risk of unfair prejudice outweighed any minimal probative value the state may have been able to articulate. The court would have granted a pretrial motion to exclude any reference to it, and sustained a timely objection when the state elicited testimony about it.

2. Absent the irrelevant and unfairly prejudicial domestic violence evidence, Mr. Barnes would likely have obtained a more favorable trial outcome.

Mr. Barnes's defense hinged on whether the jury believed his testimony that he did not intend to strike Schultz when he kicked his legs. As just outlined, the jury likely used the domestic violence testimony as propensity evidence. That is, learning that the deputies had "probable cause" to arrest him for "Assault Four Domestic Violence" likely caused the jury to consider Mr. Barnes a violent person—the kind of person who intentionally hits people. RP (8/10/15) 23. The evidence likely undermined Mr. Barnes's defense in the jurors' minds.

The domestic violence evidence also tended to make Mr. Barnes appear contemptible to the jury, undermining his credibility. Because the defense theory relied on Mr. Barnes's testimony that he did not intentionally strike Schultz, this also undercut his defense.

Furthermore, the prosecutor exacerbated the prejudice by highlighting the improper testimony in closing. He began his argument by reminding the jury of the domestic violence allegation and noting that Scheyer "developed probable cause to arrest" Mr. Barnes based on Brand's statements. RP (8/11/15) 77. He again brought up the domestic violence allegation near the close of his rebuttal, shortly before deliberations began, and again reminded the jury that the deputies had "probable cause for arrest" based on Brand's statements. RP (8/11/15) 91.

The *Gunderson* court held that, where the state had to prove an assault occurred to convict Gunderson of the charged offense, "it is reasonably probable that absent the highly prejudicial evidence of Gunderson's past [domestic] violence the jury would have reached a different verdict." 181 Wn.2d at 926. The same is true here: absent the highly prejudicial evidence that Mr. Barnes had committed a domestic violence assault against Brand, it is reasonably probable that the jury would have credited his defense and returned a not guilty verdict.

Mr. Barnes's defense was not implausible. His stated intent for kicking his legs—to get them inside the Tahoe before the deputies shut the door—was consistent with Scheyer's description of the action as "a push kick." RP (8/10/15) 26. Mr. Barnes was on his back, halfway inside the vehicle, with his hands cuffed behind him. He thus had limited freedom of

movement and pushing with his legs may have been the only way to get further inside.

Furthermore, Mr. Barnes was intoxicated, the incident occurred at night, and he had a limited field of vision due to his position in the Tahoe. Thus, he might simply have failed to notice that his feet were contacting Schultz rather than the vehicle. The jury could have had reasonable doubt as to his intent.

Mr. Barnes had a plausible defense, which depended entirely on his credibility. The probability of a better outcome absent the domestic violence testimony is high enough to undermine confidence in the result obtained.[4] This court must reverse Mr. Barnes's conviction. *Reichenbach*, 153 Wn.2d at 137.

II. THE PROSECUTION IMPROPERLY COMMENTED ON MR. BARNES'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

The prosecutor elicited police testimony about Mr. Barnes's refusal to answer questions in its case-in-chief. The prosecutor also cross-examined Mr. Barnes on his refusal to answer the deputies' questions. RP (8/10/15) 34, 54. The prosecutor then referred to Mr. Barnes's exercise of

[4] As argued below, defense counsel also rendered ineffective assistance by failing to object to improper police testimony and prosecutorial misconduct. This court should evaluate the prejudice flowing from counsel's deficient performance in light of the cumulative effect of all the attorney's unreasonable errors. *Ryder*, 342 F.3d at 1000-01; *Brett*, 142 Wn.2d at 882-83.

the right to remain silent in closing argument. RP (8/11/15) 91. This amounts to a manifest constitutional error.

A. The government may not comment on an accused person's exercise of the right to remain silent.

A police witness may not comment on the silence of the defendant so as to imply guilt from a refusal to answer questions. *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). The state bears the burden of showing such a comment harmless beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

A defendant may raise an improper comment on his exercise of the right to remain silent for the first time on appeal. *State v. Romero*, 113 Wn. App. 779, 786, 792, 54 P.3d 1255 (2002); RAP 2.5(a)(3). To raise a manifest error, an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).[5] An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

[5] The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.*

As a rule, "*any* direct police testimony as to the defendant's refusal to answer questions is a violation of the defendant's right to silence." *Romero*, 113 Wn. App. at 793 (emphasis in original). Thus, testimony that a defendant "did not answer and looked away without speaking" when questioned by police is a direct comment on the exercise of the right remain silent. *Easter*, 130 Wn.2d at 241.

Likewise, testimony that an officer "read [the defendant] his Miranda warnings, which he chose not to waive, would not talk to me" and that the defendant was "uncooperative" is a direct comment amounting to a constitutional violation. *Romero*, 113 Wn. App. at 793.

B. The prosecution elicited direct comments on Mr. Barnes's exercise of his right to silence.

Here, the prosecutor deliberately elicited police testimony that Mr. Barnes refused to answer the deputies' questions. First, when Scheyer described Mr. Barnes as "non-compliant," the prosecutor asked what she meant, eliciting testimony that he refused to speak with the officers. RP (8/10/15) 22. This directly commented on Mr. Barnes's exercise of his constitutional right to silence.

After Schultz testified that the deputies asked to speak with Mr. Barnes, the prosecutor inquired, "Did he respond?" RP (8/10/15) 34. Schultz then answered that Mr. Barnes's "responses were somewhat vague

and he was not very forthcoming with any information and *not wanting to respond to our questions*." RP (8/10/15) 34 (emphasis added). This was also a direct comment on the right to silence.

The prosecutor exacerbated the violation by asking Mr. Barnes about it on cross examination. RP (8/10/15) 54. The prosecutor then sought to exploit the improper comment on Mr. Barnes's exercise of his constitutional right by referring to it in closing. RP (8/11/15) 91. Thus, the state deliberately and repeatedly put before the jury the fact that Mr. Barnes exercised his right not to answer police questions.

3. The state cannot show the violation harmless beyond a reasonable doubt.

As described above, Mr. Barnes's defense relied on his own testimony that he did not intend to strike Schultz. The comment on his exercise of his right to silence tended to undermine his credibility and also made him appear guilty of the unfairly prejudicial domestic violence allegations.

A reviewing court presumes that impermissible comments on the right to silence harmed the accused unless the state proves otherwise beyond a reasonable doubt. *Fuller*, 169 Wn. App. at 813. The state cannot meet its burden of overcoming this presumption to show the constitutional violation harmless beyond a reasonable doubt. *Easter*, 130 Wn.2d at 242.

The remedy is to reverse Mr. Barnes's conviction and remand for a new trial. *Easter*, 130 Wn.2d at 243.

4. Defense counsel rendered ineffective assistance by failing to object to the comments on Mr. Barnes's exercise of the right to silence.

Defense counsel objected to Scheyer telling the jury that Mr. Barnes was "non-compliant" only on the ground that the testimony was "conclusive." RP (8/10/15) 22. This was not a proper objection. Furthermore, counsel should have objected to testimony that Mr. Barnes would not answer questions, to cross-examination on the subject, and to the prosecutor's use of these improper comments in closing.

His attorney's failure to do so allowed the state to use Mr. Barnes pre-arrest silence to undermine his credibility and cast doubt on his defense. The prejudice from this error compounded the prejudice flowing from defense counsel's failure to exclude the irrelevant and highly prejudicial domestic violence testimony.

Mr. Barnes was prejudiced by his attorney's deficient performance.[6] *Kyllo*, 166 Wn.2d at 862. This court should reverse his conviction and remand for a new trial. *Id.*

[6] As further argued below, defense counsel also rendered ineffective assistance by failing to object to improper police testimony invading the province of the jury and prosecutorial misconduct. This court should evaluate the prejudice flowing from counsel's deficient

III. PROSECUTORIAL MISCONDUCT DENIED MR. BARNES A FAIR TRIAL

The prosecutor repeatedly expressed his personal opinion that Mr. Barnes intentionally kicked Schultz and was guilty of assault. The prosecutor also misstated the role of the jury, and exploited testimony commenting on Mr. Barnes's exercise of the right to silence. The misconduct was flagrant, ill-intentioned, and prejudicial. Mr. Barnes's conviction must be reversed.

A. A prosecutor's improper arguments require reversal when they likely affected the outcome of a trial.

A defendant seeking a new trial based on prosecutorial misconduct must show that the prosecutor's challenged conduct was both improper and prejudicial "in the context of the record and all of the circumstances of the trial." *In re Restraint of Glasmann*, 175 Wn.2d 696, 704, 206 P.3d 673 (2012). To establish prejudice, the defendant must "show a substantial likelihood that the misconduct affected the jury verdict." *Glasmann*, 175 Wn.2d at 704.

A defendant who failed to object at trial must also show "that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704. Where a

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performance in light of the cumulative effect of all the attorney's unreasonable errors. *Ryder*, 342 F.3d at 1000-01; *Brett*, 142 Wn.2d at 882-83.

prosecutor has engaged in multiple acts of misconduct, the reviewing court does not examine each in isolation to decide whether the appellant has shown sufficient prejudice. Instead the court looks at the cumulative effect of all the improper conduct. *Glasmann*, 175 Wn.2d at 707-12.

Prosecutorial misconduct may require reversal even where ample evidence supports the jury's verdict. *Glasmann*, 175 Wn.2d at 711-12. The focus of the reviewing court's inquiry "must be on the misconduct and its impact, not on the evidence that was properly admitted." *Glasmann*, 175 Wn.2d at 711.

B. The prosecutor repeatedly expressed his personal opinion of Mr. Barnes's guilt.

As the *Glasmann* court noted, "many cases warn of the need for a prosecutor to avoid expressing a personal opinion of guilt." *Glasmann*, 175 Wn.2d at 706-07. A prosecutor who "'throw[s] the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused'" denies the defendant a fair trial. *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

In deciding whether a prosecutor's remarks amount to an expression of personal opinion, the reviewing court considers the comments in the context of the entire argument. *State v. McKenzie*, 157

Wn.2d 44, 53-54, 134 P.3d 221 (2006). Prejudicial error occurs if it is "clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." *McKenzie*, 157 Wn.2d at 54 (emphasis omitted) (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983).

The primary factual issue in Mr. Barnes's case was whether he had acted with the requisite intent. The prosecutor repeatedly stated that he thought Mr. Barnes's alleged conduct showed such intent. RP (8/11/15) 80, 92. The prosecutor made a similar statement regarding the requirement that a touching be offensive. RP (8/11/15) 81 ("I don't think you have to be unduly sensitive to find it offensive to be kicked in the face five times while doing your job."). Just before deliberations, the prosecutor again communicated his personal view that the state had met its burden: "I think you can find beyond a reasonable doubt there was an assault of a law enforcement officer carrying out his duty." RP (8/11/15) 92.

The prosecutor did more than argue reasonable inferences from the evidence. He clearly and unmistakably communicated his personal opinion that Mr. Barnes was guilty. This amounted to prejudicial misconduct. *McKenzie*, 157 Wn.2d at 54.

C. The prosecutor misrepresented the role of the jury.

The prosecutor repeatedly told the jurors that it was their job to decide what actually happened during the events at issue. RP (8/11/15) 82. This was improper. The jury's role is not to "solve a case [or] declare what happened on the day in question." *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009); *accord State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).[7]

Instead, the "jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. It is improper for a prosecutor to tell the jurors that they have any other role. *Id.*

The prosecutor repeatedly told the jurors that their duties included "deciding what occurred." RP (8/11/15) 82. This misstated the role of the jury and amounted to improper argument. *Emery*, 174 Wn.2d at 760.

[7] The *Emery* court held that, although the prosecutor's remarks amounted to misconduct, in the absence of a timely objection they did not merit reversal under the circumstances presented there. *Emery*, 174 Wn.2d at 763-64. Here, the misconduct does merit reversal because it exacerbated the prejudice resulting from the prosecutor's other improper expressions of personal opinion (as well as that stemming from the improper police testimony already discussed). Furthermore, this prosecutor had the benefit of the *Anderson* and *Emery* opinions and thus could not reasonably have thought the argument proper.

D. The prosecutor commented on Mr. Barnes's exercise of his right to silence.

A prosecutor commits misconduct and violates the privilege against self-incrimination by commenting on an accused person's exercise of the right to silence during closing. *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009). As outlined above, the prosecutor did just that at Mr. Barnes's trial. RP (8/11/15) 91. Once an improper comment on an accused person's silence has been made, "the bell is hard to unring." *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004). The prosecutor's argument was improper. *Knapp*, 148 Wn. App. at 420.

E. The prosecutor's flagrant and ill-intentioned misconduct prejudiced Mr. Barnes.

Courts reviewing prosecutorial misconduct look to the overall effect of all the improper argument. *Glasmann*, 175 Wn.2d at 707-12. The inquiry does not focus on the prosecutor's subjective intent, but on whether the misconduct prejudiced the defendant and whether a timely objection and remedial instruction could have cured it. *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976, *cert. denied*, 135 S.Ct. 2844 (2015) (Walker I).

Repeated instances of prejudicial misconduct "'may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.'" *Glasmann*, 175 Wn.2d at 707 (quoting *State v.*

Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (Walker II)). Here, Mr. Barnes sought to create a reasonable doubt that he intended to strike Schultz. The prosecutor's repeated assertions of opinion as to Mr. Barnes's intent and guilt, combined with his misrepresentation of the jury's role and comments on his right to remain silent were "'so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.'" *Id.*

The prosecutor persistently "thr[ew] the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.' " *Monday*, 171 Wn.2d at 677 (internal quotation marks omitted). He then told the jurors that, rather than decide whether Mr. Barnes's denial and the surrounding circumstances made it reasonable to doubt that he intended to kick Schultz, their job was to decide what really happened. Finally, he deliberately and improperly undermined Mr. Barnes's credibility by eliciting and exploiting police testimony regarding his pre-arrest silence.

Mr. Barnes's defense relied on his credibility and on the jury holding the state to its burden of proof. Rather than arguing the facts, the prosecutor chose to express his personal opinion, to confuse the jury's role, and to encourage jurors to rely on Mr. Barnes's exercise of his constitutional rights.

The cumulative effect of these numerous instances of misconduct could not have been cured by remedial instruction and denied Mr. Barnes a fair trial. *Glasmann*, 175 Wn.2d at 710; *Monday*, 171 Wn.2d at 677. The remedy is to reverse the conviction and remand for further proceedings. *Glasmann*, 175 Wn.2d at 714.

F. Defense counsel unreasonably failed to object to the highly prejudicial prosecutorial misconduct.

Mr. Barnes's trial attorney deprived him of the right to effective assistance of counsel by failing to object to the prosecutor's improper and prejudicial closing argument. Although the prosecutor's misconduct itself merits reversal in this case, defense counsel's failure to object also supports an ineffective assistance claim, providing an independent basis for reversal. *See State v. Gasteazoro-Paniagua*, 173 Wn. App. 751, 760, 294 P.3d 857, *review denied sub nom. State v. Gasteazor-Paniagua*, 178 Wn.2d 1019, 312 P.3d 651 (2013); *State v. Dickerson*, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993).

Well-established case law prohibited the arguments the prosecutor repeatedly made here. The misconduct directly undermined Mr. Barnes's defense. No reasonable tactical consideration can justify defense counsel's failure to object.

The unreasonable failure to object, in conjunction with the other errors described above, also likely affected the verdict. The errors not only allowed the state to admit the irrelevant and unfairly prejudicial domestic violence evidence, they permitted both Scheyer and the prosecutor to give improper opinions as to Mr. Barnes's guilt. This court should reverse the conviction and remand for a new trial. *Kyllo*, 166 Wn.2d at 862.

IV. POLICE TESTIMONY INVADED THE PROVINCE OF THE JURY

Deputy Scheyer communicated her opinion of Mr. Barnes's guilt by describing his conduct as an assault. Defense counsel failed to object to this testimony. The officer's improper opinion testimony invaded the province of the jury and denied Mr. Barnes a fair trial.

A. Deputy Scheyer invaded the province of the jury by opining that Mr. Barnes committed an "assault."

As a rule, a witness may not give "an opinion regarding the guilt or veracity of the defendant." *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Courts consider such testimony "unfairly prejudicial to the defendant because it invad[es] the exclusive province of the [jury]." *Demery*, 144 Wn.2d at 759 (alterations in original) (internal quotation marks omitted); *accord State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009); *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) *aff'd on other grounds,* 165 Wn.2d 870, 204 P.3d 916 (2009).

No witness may offer improper opinion testimony by direct statement or inference.[8] *King*, 167 Wn.2d at 331. A law enforcement officer's improper opinion testimony may be particularly prejudicial because it carries "a special aura of reliability." *King*, 167 Wn.2d at 331 (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)).

In this case, Scheyer provided her opinion on Mr. Barnes's guilt. Specifically, she testified that Mr. Barnes's conduct amounted to an "assault." RP (8/10/15) 26.[9]

Mr. Barnes denied that his conduct amounted to an assault against Schultz because he did not intend to strike the deputy. RP (8/10/15) 51-53, 55-56. Thus, Scheyer's testimony that Mr. Barnes assaulted Schultz directly contradicted Mr. Barnes's own account of the incident.

Scheyer identified herself as an experienced police officer. RP (8/10/15) 18-20. Thus, an aura of reliability surrounded her improper opinion testimony. *King*, 167 Wn.2d at 331

The improper opinion testimony invaded the province of the jury. It violated Mr. Barnes's Sixth and Fourteenth Amendment right to a jury

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[8] U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22.

[9] As a matter of law, this creates a manifest error affecting a constitutional right. *State v. Thach*, 126 Wn. App. 297, 312, 106 P.3d 782 (2005). Accordingly, it may be reviewed for the first time on appeal, despite the absence of objection. *Id.*; RAP 2.5 (a)(3). Alternatively, the court should review the error even if it does not qualify under RAP 2.5(a)(3). *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011); RAP 1.2 (a).

trial and his Fourteenth Amendment right to due process. The jury should have been allowed to determine whether Mr. Barnes's conduct constituted an assault from the evidence. Instead, Scheyer provided an improper opinion that effectively resolved the case in favor of the prosecution.[10] RP (8/10/15) 26.

The assault conviction must be reversed and the charge remanded for a new trial. *King*, 167 Wn.2d at 332.

B. Defense counsel should have objected to Deputy Scheyer's testimony that Mr. Barnes committed an "assault."

Without a valid tactical justification, failure to object to improper opinion testimony constitutes deficient performance. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007) (Hendrickson II). Here, counsel had no strategic reason to allow Scheyer's improper opinion.

The improper opinion went directly to the heart of the case. Scheyer's testimony contradicted Mr. Barnes's own account. RP (8/10/15) 51-53, 55-56. Mr. Barnes's intent was the main issue discussed by both lawyers in closing. RP (8/11/15) 79-82, 85-86, 91-92.

Defense counsel should have objected to Scheyer telling the jury that Mr. Barnes's conduct constituted an assault and obtained a curative

[10] This created a manifest error affecting Mr. Barnes's constitutional rights to a jury trial and to due process under the Sixth and Fourteenth Amendments. Accordingly, the error may be raised for the first time on review. RAP 2.5(a)(3).

instruction. His attorney's failure to do so allowed the jury to convict based on Scheyer's assertion that the conduct amounted to an assault. The prejudice from this error, furthermore, compounded the prejudice flowing from defense counsel's failure to exclude the irrelevant and highly prejudicial domestic violence testimony, his failure to object to comments on his client's right to silence, and his failure to object to prosecutorial misconduct..

Mr. Barnes was prejudiced by his attorney's deficient performance.[11] *Kyllo*, 166 Wn.2d at 862. His conviction must be reversed and the case remanded for a new trial. *Id.*

V. THE COURT IMPOSED A LEGAL FINANCIAL OBLIGATION NOT AUTHORIZED BY STATUTE

At sentencing, the court required Mr. Barnes to pay $500 to the "Skamania County Sheriff's Investigative Fund," but did not identify any statutory basis for imposing such an obligation. CP 61; RP (8/13/15) 1-7.

Nor does the record contain any evidence concerning the factual basis for the amount ordered. Although one finding on the judgment and sentence appears to justify the obligation, the finding concerns an inapplicable statute. CP 57.

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[11] As already noted, the prejudice flowing from counsel's deficient performance should be measured in light of the cumulative effect of all the attorney's unreasonable errors. *Ryder*, 342 F.3d at 1000-01; *Brett*, 142 Wn.2d at 882-83.

Sentencing courts may impose only those punishments authorized by statute. *State v. Button*, 184 Wn. App. 442, 446, 339 P.3d 182 (2014).

The appellate court reviews *de novo* claims that a sentence is not authorized by statute. *Button*, 184 Wn. App. at 446. Issues of statutory interpretation are also reviewed *de novo*. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). A defendant may raise a claim that the court imposed a sentence without statutory authority for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

Here, the court found that the "Skamania County Sheriff's Office costs for its emergency response are reasonable."[12] CP 57. The finding cites RCW 38.52.430 as statutory authority. CP 57.

The SRA's definition of "Legal financial obligation" includes a reference to RCW 38.52.430, but only for certain driving offenses:

> Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430.

RCW 9.94A.030(31).[13] RCW 38.52.430 also makes clear that it applies only to certain driving offenses:

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[12] No evidence in the record supports this finding. RCW 38.52.430 provides a procedure for the prosecutor to submit evidence of the costs of emergency response for the court to find reasonable, but the prosecutor did not do so here.

> A person whose intoxication causes an incident resulting in an appropriate emergency response, *and* who, in connection with the incident, has been found guilty of or has had their prosecution deferred for (1) driving while under the influence of intoxicating liquor or any drug, RCW 46.61.502; (2) operating an aircraft under the influence of intoxicants or drugs, RCW 47.68.220; (3) use of a vessel while under the influence of alcohol or drugs, RCW 79A.60.040; (4) vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a); or (5) vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), is liable for the expense of an emergency response by a public agency to the incident.

RCW 38.52.430 (emphasis added).

Thus, the plain language of the statute requires *both* that the defendant's intoxication cause the event giving rise to the emergency response *and* that the defendant sustain a conviction (or receive a deferred prosecution) for one of the enumerated offenses.

The crimes listed in RCW 38.52.430 do not include third degree assault. Thus, the statute cited does not authorize the $500 obligation.[14]

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[13] The only other portion of the legal financial obligation definition expressly allowing emergency response or police investigative costs concerns "county or interlocal drug funds," which are not at issue here. RCW 9.94A.030(31).

[14] A diligent search has disclosed no Washington statute authorizing sentencing courts to impose such an obligation under the circumstances presented here. Were this court to hold the Sentencing Reform Act ambiguous as to whether courts may impose such an obligation, several principles of statutory construction prohibit imposition of costs for emergency response. First, a primary purpose of the Act is to structure sentencing courts' discretion to promote consistency. RCW 9.94A.030. Allowing courts unfettered discretion to impose investigative costs would plainly run counter to this purpose. *See State v. Barnes*, 117 Wn.2d 701, 711-12, 818 P.2d 1088 (1991). Second, statutes imposing the costs of investigating and prosecuting crime on defendants are in derogation of the common law and must therefore be strictly construed. *See, e.g*, *State v. Cawyer*, 182 Wn. App. 610, 619, 330 P.3d 219 (2014), *State v. Buchanan*, 78 Wn. App. 648, 651, 898 P.2d 862 (1995). Third, under the canon of expressio unius est exclusio alterius, the statutory authorization for imposing emergency response or investigative costs under certain circumstances implies that the legislature did

Nor is there any other statute authorizing imposition of "investigative" costs.

The judgment and sentence shows that the trial court required Mr. Barnes to pay $500 to the investigative fund based on an erroneous understanding of the law. The court exceeded its statutory authority in imposing the obligation. The remedy is to reverse the imposition of the investigative fund assessment and remand for resentencing. *State v. Moon*, 124 Wn. App. 190, 195, 100 P.3d 357 (2004).

CONCLUSION

This court should reverse Mr. Barnes's conviction because ineffective assistance of counsel, improper comments on his right to silence, and prosecutorial misconduct denied him a fair trial. His attorney unreasonably failed to keep irrelevant and unfairly prejudicial domestic violence evidence from the jury and the prosecutor repeatedly expressed his personal opinion on ultimate jury issues. The government improperly commented on Mr. Barnes's exercise of the right to silence, and a police witness improperly opined that Mr. Barnes committed an "assault."

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not intend to authorize such costs in other circumstances. *See, e.g., In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Finally, where the canons of construction do not resolve an ambiguity in a sentencing statute, the rule of lenity requires courts to construe it in the defendant's favor. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009).

The prejudice resulting from many of these constitutional violations and trial errors exacerbated the prejudice flowing from others. Several of these errors standing alone amount to reversible error, and their cumulative effect plainly denied Mr. Barnes a fair trial. *See State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The remedy is to reverse his conviction and remand for further proceedings. *State v. Coe*, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984).

If this court does not reverse Mr. Barnes's conviction, it should still reverse imposition of the $500 investigative fund LFO. The trial court imposed it based on an erroneous understanding of the law, and it is not authorized by statute or supported by the record.

Respectfully submitted on November 30, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Richard Barnes
4906 SE 40th Ave
Milwaukie, OR 97222

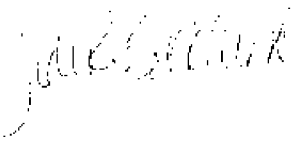
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Skamania County Prosecuting Attorney
kick@co.skamania.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 30, 2015.



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